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Book Review

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RELIGION ON TRIAL: HOW THE SUPREME COURT TRENDS THREATEN FREEDOM OF CONSCIENCE IN AMERICA, by Phillip E. Hammond, David W. Machacek, and Eric Michael Mazur.
Walnut Creek, California: AltraMira Press, 2004. 160pp. Paper. $19.95. ISBN: 0-7591-0601-0. Cloth. $65.00. ISBN: 0-7591-0600-2.

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The thesis of RELIGION ON TRIAL "is (1) that the First Amendment protects the freedom of conscience—broadly understood as the 'moral powers of rationality and reasonableness in terms of which persons define personal and ethical meaning in living' (Richards 1999: 86)—and (2) that therefore Supreme Court decisions that further restrict government sponsorship of religion and decisions that expand the free exercise of religion are consistent with the meaning and intent of the First Amendment" (p.19). To support this thesis, Phillip E. Hammond, David W. Machacek, and Eric Michael Mazur (the "Authors") rely primarily on an historical argument with three parts. The first part argues that the "original intent" of the Framers with respect to the First Amendment "was to set in motion a process of expanding liberty" (p.36). The second part chronicles the expansion of protection for the free exercise of religion to "refer not just to religion in the traditional sense but to conscience" (p.101), and provides three case studies showing how this "trend toward expanded liberty of conscience has led logically to greater moral autonomy for individuals and further restrictions on government's ability to regulate" abortion, euthanasia, and homosexual rights (p.111). Finally, the third part maintains that the current understanding of the religion clauses of the First Amendment by today's "regressive justices does not reflect the thinking or intentions of the eighteenth-century Framers of the Constitution and Bill of Rights but rather reflects an understanding of church and state that emerged in the nineteenth century" (pp.xviii-xix).

Chapter One does a good job of summarizing the debates among the Framers of the U.S. Constitution regarding the relationship between the federal government's powers, civil rights, and fundamental freedoms. The Authors stress that the U.S. Constitution should be understood as reflecting both a social contract theory and a natural rights theory. The specifications of federal powers in the Constitution and certain civil rights in the Bill of Rights (e.g., right to petition government for redress of grievances) reflect a social contract theory and are subject to periodic renegotiation by the people. The freedoms specified in the Bill of Rights, like freedom of religion and speech, however, should be understood as "rights of the highest order, which are thought to be inherent in human nature, inalienable, therefore non-negotiable, and thus beyond the reach of legislation" (p.11). The Authors' emphasis on the original understanding of religious freedom as a natural right provides a helpful corrective to the current Supreme [*627] Court's astonishing derogation of the free exercise of religion to legislative enactments that are neutral and generally applicable in EMPLOYMENT DIVISION v. SMITH (1990).

In Chapter Two, the Authors attempt to discern the content of the natural right of religious freedom by drawing on the "considerable body of commentary on the subject of religious liberty and the freedom of conscience" left by "the Framers of the U.S. Constitution" (p.20). The Authors' claim that the "Virginia Declaration of Rights," Madison's "Memorial and Remonstrance," and Jefferson's "Bill for Establishing Religious Freedom" "formed the philosophical basis of First Amendment to the U.S. Constitution" (p.29). In particular, Madison's "Memorial and Remonstrance," which argues against state support for clergy in Virginia, and his other writings are relied on to discern the essence of the Framers' intent. From these materials, the Authors' conclude that the Framers' intended "to set in motion a process of expanding liberty" (p.36). Moreover, the freedom of conscience "is not merely another way of talking about the 'freedom of religion,' as 'religion' is conventionally understood," but it "is the source from which the freedoms of religion, speech, the press, and association are derived" (p.39).

The Authors argue that this understanding of the Framers' intent became apparent in the Supreme Court's jurisprudence regarding the expansion of religious liberty (Chapter Five) and the expansion of liberty in the areas of abortion, euthanasia, and homosexual rights (Chapter Six). The Supreme Court's decisions expand the

protection under the free exercise clause from only protecting religious beliefs (e.g., REYNOLDS v. U.S. (1878)) to also protecting religiously motivated actions (e.g., SHERBERT v. VERNER (1963)). As with other fundamental rights, SHERBERT prohibits the government from imposing a substantial burden on the free exercise of religion unless the government demonstrates that the law in question was narrowly tailored to achieve a compelling governmental interest (i.e., strict scrutiny). The Authors further maintain that the protection of religion was expanded so that deeply and sincerely held beliefs that function like traditional religious beliefs were also considered protected by the free exercise clause. They characterize this as a shift from the freedom of religion to the freedom of conscience. Moreover, "[t]he more sensitive the state becomes in protecting conscience," the Authors argue, "the more likely it is to uncover heretofore unacknowledged 'established' religion . . . in violation of the Establishment Clause" (p.102).

Identifying this broader understanding of religion enables the Authors to see the often missed connection between free exercise of religion and the Supreme Court's interpretation of the concept of liberty in the Due Process Clause of the Fourteenth Amendment. The Authors claim that "[t]he trend toward expanded liberty of conscience has led logically to greater moral autonomy for individuals and further restrictions on the government's ability to regulate such behaviors" (p.111). For example, in the abortion context, "whether or not life begins at conception is necessarily a conscience issue" (p.114). Thus, the Authors agree with Ronald Dworkin that [*628] "'freedom of choice about abortion is a necessary implication of the religious freedom guaranteed by the First Amendment'" (p.115) (quoting Dworkin 1993, at 26), and claim that this logic can be extended to cover issues like euthanasia and homosexual marriage under the Due Process Clause.

This expansion of liberty, however, has been slowed down or reversed by "the massive shift from the liberal 1932-1968 period to the conservative 1980-present period," which reflects a regressive nineteenth-century Republican Protestantism rather than the progressive liberalism of the founders (p.133). In Chapter Three, the Authors note that Justice Story, the preeminent representative of the nineteenth-century Republican Protestantism, claimed that the First Amendment "was designed 'to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment'" (p.56) (quoting Story [1833] 1970), which resulted in an "unofficial establishment of Christianity" (p.56). Even though Story's nonpreferentialist interpretation of the First Amendment was before the Free Exercise (CANTWELL v. CONNECTICUT (1940)) and Establishment Clauses (EVERSON v. BD. OF EDUCATION (1947) were incorporated and applied to the states through the Due Process Clause of the Fourteenth Amendment, the Authors argue in Chapter Seven that this nonpreferentialist view of the First Amendment has been adopted by many of the Justices on the Supreme Court and has resulted in a regression or contraction of the separation of church and state. To support their argument, the Authors analyze each Supreme Court Justice's votes in church-state cases since 1960. (See Appendix 2, pp.163-164). They give the Justices points (which are translated into percentages) if the Justices have voted for Free Exercise Clause exemptions or for Establishment Clause violations. Justice William O. Douglas (100%) is rated the most separationist while Justice Clarence Thomas (0%) is rated the least separationist. Those Justices who have voted strongly antiseparationist are referred to as "regressive" while those who have voted strongly separationists are referred to as "progressives." "As a rule, the regressive bloc of three (Rehnquist, Scalia, Thomas) were on the winning or losing side against a progressive bloc of four (Stevens, Souter, Ginsburg, Breyer), the outcomes thus depending upon how two 'swing' justices (O'Connor, Kennedy) voted" (p.136). Although the regressive bloc claims to follow the Framer's "original intent," the Authors argue that the regressive bloc have wrongly substituted a judicial philosophy of majority rule and narrow textual reading of the Constitution for the Framer's progressive judicial philosophy embracing the natural right to freedom of conscience that was intended to lead to an expansion of liberty over time (pp.145-147). Finally, the Authors conclude with a call for a return to the progressive original intent of the Framers in order to protect the freedom of conscience which protects "the very nature of what it means to be human" (p.152).

Despite my own separationist leanings, I found two aspects of RELIGION ON TRIAL problematic. First, from the perspective of constitutional interpretation, the heavy reliance on historical argument is problematic [*629] because historical arguments rarely provide a conclusive basis for interpreting the Constitution. With respect to the religion clauses of the First Amendment, Jon Witte notes that for the critical stages of deliberation in the House and Senate, "the record is exceedingly cryptic and conclusory—leaving courts and commentators ever since with ample room for speculation and interpolation" (Witte 2005, at 80). In addition, the recorded

interpretations (including those of individual Framers like Madison) support a plurality of interpretations of the First Amendment. For example, Chief Justice Rehnquist (WALLACE v. JAFFREE, dissenting) and Justice Thomas (ROSENBERGER v. RECTOR, concurring) cite Madison to support a regressive or nonpreferrentialist understanding of the Establishment Clause, while Justice Souter (ROSENBERGER, dissenting) and (LEE v. WEISMAN, concurring) cites Madison for a progressive or separationist understanding of the Establishment Clause. Finally, even if their historical argument is correct, the Authors fail to provide an argument for why the "original intent" of the Framers should be the controlling interpretative approach. The Constitution does not include interpretative rules requiring that the Constitution be understood according to the Framers' intent. Consequently, interpreters must choose whether to rely on the Framer's intent, the text of the Constitution, Supreme Court precedent, prudential consequences, ethical concerns, or some combination of these factors. For instance, Ronald Dworkin has argued that "constitutional clauses are moral principles that must be applied through the exercise of moral judgment" (Dworkin 1996, at 6). Under this model, constitutional interpretation is basically a question of "how an abstract moral principle is best understood" in the context of a particular legal dispute and not a question of how the Framers "would have interpreted those principles or applied them in concrete cases" (Dworkin 1996, at 2, 10). As a result, the Authors' separationist reading of the religion clauses of the First Amendment should not be understood to reflect a definitive historical record, but one attempt to interpret that historical record in a manner that they think provides the best understanding of religious liberty.

I also take issue with the Authors' claim that the Supreme Court has come "to realize (1) that what the Free Exercise Clause of the First Amendment protects is the freedom of conscience, whether conscience is expressed in religious or secular terms" (pp.108-109). While I agree that the term *religion* should be broadly understood to include comprehensive convictions not traditionally thought to be religious (e.g., humanism, communism, hedonism) (Modak-Truran 2004, at 721-728), the Supreme Court has not defined religion broadly with respect to the religion clauses of the First Amendment. Rather, the Court has tended to deny Free Exercise exemptions to even traditional religions if their practices deviate too much from those of Christianity, such as Native American ritual peyote smoking (EMPLOYMENT DIVISION v. SMITH), Native American religious rituals on sacred land (LYNG v. NORTHWEST INDIAN CEMETARY PROTECTIVE ASS'N), and the Jewish practice of wearing a yarmulke (GOLDMAN v. WEINBERGER). As the Authors indicate, however, the Supreme Court in U.S. v. SEEGER, defined religion broadly for purposes of [*630] granting conscientious objector status to Seeger under federal statutory law even though he only objected to war on purely ethical grounds. The Court clarified in WELSH v. U.S., that its "central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life" (WELSH, at 339). I expected that the Authors, as scholars of religion, would have argued that this broader conception of religion should be adopted in Free Exercise and Establishment Clause cases, rather than arguing for a shift from freedom of religion to freedom of conscience. This shift is confusing because the Framers chose to eliminate "rights of conscience" from the later drafts of the First Amendment (Witte 2005, at 80-89), and the notion of "freedom of conscience" or "rights of conscience" has many different meanings (McConnell 1990, at 1488-1492). Michael McConnell has persuasively argued that "rights of conscience" was eliminated from the final drafts either because it was considered redundant with the free exercise of religion or, if it is understood as broader than religion, "because the framers chose to confine the protections of the free exercise clause to religion" (McConnell 1990, at 1494-1495). In either case, the Authors' argument would have been more persuasive if it advocated that the freedom of religion should be understood to encompass a broader definition of religion (as is common in the religion academy), rather than advocating a shift from the freedom of religion to the freedom of conscience.

Despite these problems, RELIGION ON TRIAL makes the historical debates about the religion clauses accessible to a broad audience. In addition, it properly links issues of free exercise of religion to issues about fundamental rights in a manner that is usually missed by legal scholars and political scientists. Consequently, this book would be a good addition to undergraduate, graduate, and law school courses on the religion clauses or on law and religion.

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